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Filing date: **01/20/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91125615
Party	Plaintiff UNIVERSITY OF SOUTHERN CALIFORNIA ,
Correspondence Address	SCOTT A. EDELMAN GIBSON DUNN & CRUTCHER, LLP 2029 CENTURY PARK EAST, STE. 4000 LOS ANGELES, CA 90067-3026
Submission	Motion to Dismiss and accompanying Notice of Reliance
Filer's Name	Peter F. Weinberg
Filer's e-mail	ptodenver@gibsondunn.com
Signature	/pfw/
Date	01/20/2005
Attachments	motion to dismiss (california v. carolina).pdf (21 pages)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

UNIVERSITY OF SOUTHERN
CALIFORNIA

Opposer,

v.

UNIVERSITY OF SOUTH CAROLINA,

Applicant.

Opposition No. 91125615

Serial No. 75/358,031

Mark: **SC (Stylized)**

Filed: September 16, 1997

Published: May 18, 1999

Motion to Dismiss

The University of Southern California ("California") hereby moves to dismiss the counterclaim filed by the University of South Carolina ("Carolina") seeking to cancel California's Registration No. 2683137.

I. Introduction

This case arises out of California's opposition to Carolina's attempt to register a stylized version of the letters "SC" for hats, shirts, and similar clothing.¹ In this case, Carolina's first response to the notice of opposition was to try to seek cancellation of California's incontestable word-mark in Registration No. 1844953 for the letters "SC" on such clothing. This Board properly granted summary judgment on that cross-claim.

¹ Traditionally, California understands that Carolina has used the letters "USC" or a single "C" with a Gamecock in the middle for Carolina's merchandizing.

Now, after California amended its opposition to make absolutely clear that California was relying upon its common law rights and its stylized registration in Registration No. 2683137 as well as the word mark in Registration No. 1844953, Carolina moved to cancel this second registration. Unfortunately for Carolina, its "best defense is a good offense" strategy runs straight into the *Morehouse* doctrine. That doctrine (also known as the *prior-registration* doctrine) provides that if a party cannot cancel an existing registration, it also cannot cancel or oppose a second registration of essentially the same mark. Since California owns an incontestable trademark registration for the mark SC as a typed drawing and this Board has already summarily rejected Carolina's attempt to cancel that registration, Carolina cannot challenge the second registration for SC as stylized letters on goods that overlap the first registration. The Board should apply the *Morehouse* doctrine and preclude Carolina from attempting to cancel California's stylized SC registration.

II. Statement of Facts

This present dispute between California and Carolina arose when California opposed Carolina's application to register the mark SC written as stylized letters. California owns trademark Registration No. 1844953 for the mark SC as a typed drawing (the "SC Word Mark" registration). The SC Word Mark registration issued on July 12, 1994 and is incontestable. At an earlier stage in this proceeding, Carolina filed a counterclaim to cancel the SC Word Mark registration. The Board recognized that Carolina's counterclaim failed to raise any disputed material issues of fact, and dismissed the counterclaim in its entirety.²

² See Board's Order of July 31, 2003.

California also owns trademark Registration No. 2683137 for the mark SC written as stylized letters (the "SC Interlock" registration). The SC Interlock registration issued on February 4, 2003. California did not plead the SC Interlock registration when it filed this opposition, as the SC Interlock registration did not then exist, but California amended its Notice of Opposition to include the SC Interlock registration.³ Carolina answered the amended notice, and counterclaimed to cancel the SC Interlock registration.

Similar to the Carolina application that is the subject of this opposition proceeding, the SC Word Mark and the SC Interlock registrations are for products commonly sold by universities to their fans and alumnae.

III. Argument

A. Overview of the Morehouse Doctrine

Over thirty-five years ago, the Court of Customs and Patent Appeals' *Morehouse* decision established that a party cannot object to another's registration when the other already owns a registration for essentially the same mark.⁴ Ever since *Morehouse*, courts and the Board have applied the *Morehouse* doctrine (sometimes called the *prior-registration* doctrine) in cases such as this to prevent a party from attacking a second registration for a mark when the party failed to object to a first registration. The *Morehouse* doctrine makes sense because the second registration is not in fact harming the would-be objector, inasmuch as the objector is already "harmed" by the first registration: "if the opposer can not be further injured because there already

³ See Opposer's Motion to Amend Notice of Opposition and Amended Notice of Opposition filed June 11, 2004.

⁴ *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 407 F.2d 881, 884, 160 U.S.P.Q. 715 (C.C.P.A. 1969).

exists an injurious registration, the opposer can not object to an additional registration that does not add to the injury."⁵

It might be obvious, but *Morehouse* can only be applied in cases where the second registration is similar to but not identical to the first. Naturally, a party cannot obtain two identical registrations. Rather, the *Morehouse* doctrine applies when an owner obtains a second registration that is similar to the first, such that the second registration is (1) for the same or a substantially identical mark and (2) for substantially the same goods and services.⁶

B. The Morehouse Doctrine Applies When One Registration is for a Typed Drawing and the Other is for Stylized Letters, with the Result that the Marks are Clearly "Substantially Identical"

In the context of the *Morehouse* defense, a mark in typed drawing is legally equivalent to the mark written in stylized form. The Board so held in *S & L Acquisition*, when it applied the *Morehouse* defense and granted the petitioner's motion for summary judgment to dismiss the applicant's counterclaim.⁷

The facts of *S & L Acquisition* are very instructive in this case. The *S & L* petitioner owned both an incontestable registration for ADRIEN ARPEL in stylized form, and a second registration of the same mark as a typed drawing. The applicant and counterclaimant sought to cancel the second registration and attempted to avoid *Morehouse* by arguing that the mark in typed form was legally different for these purposes than a mark in stylized form. The Board rejected that argument as a matter of law.

⁵ *O-M Bread, Inc. v. United States Olympic Committee*, 65 F.3d 933, 938, 36 U.S.P.Q.2d 1041 (Fed. Cir. 1995).

⁶ *S & L Acquisition Co. v. Helen Arpels, Inc.*, 9 U.S.P.Q. 2d 1221(T.T.A.B. 1987).

⁷ *Id.*

First, the Board articulated that the test is whether the marks project the same image and symbolize a single and continuing commercial impression.⁸ Then, the Board applied the test and found that "there can be no doubt that 'ADRIEN ARPEL' whether represented in block form or stylized lettering is the single dominant commercial impression of both marks engendering the same and continuing commercial impression."⁹

The *S & L Acquisition* rule that a stylized drawing and typed drawing are equivalent for *Morehouse* purposes applies to this case. The SC Word Mark registration is a typed drawing of the letters SC, and the SC Interlock is the same mark in a stylized form. Just as in *S & L Acquisition*, the marks share a single dominant commercial impression. If anything, the rationale to apply *Morehouse* is stronger here than it was in *S & L Acquisition*, since here California's second registration (the SC Interlock) is narrower than its first registration (the SC Word Mark registration), while in *S & L Acquisition* the second registration was broader and therefore more capable of harming third parties.

C. The Goods Are also Substantially Identical

Not only are many of the goods identical in the SC Word Mark and SC Interlock registrations, but all of the goods are substantially identical for the equitable purposes behind the *Morehouse* doctrine. The doctrine applies when the goods and services are so closely related that the opposer is not damaged by the second registration.¹⁰ For example, in *S & L Acquisition*, the Board applied the *Morehouse* doctrine as a matter of law to dismiss a counterclaim against a

⁸ *Id.*, citing *Humble Oil & Refining Co. v. Seksui Chem. Co. Ltd. of Japan*, 165 U.S.P.Q. 597 (T.T.A.B. 1970).

⁹ *Id.*

¹⁰ *S & L Acquisition Co. v. Helen Arpels, Inc.*, 9 U.S.P.Q. 2d 1221 (T.T.A.B. 1987).

registration for cosmetics because the registrant owned a similar previously issued incontestable registration for a number of specific products.¹¹ Even though the second registration was much broader than the original registration (which merely identified certain products within a larger class of products), the counterclaimant could not show any new harm because the goods in the later registration were not any closer to the counterclaimant's goods than were the goods in the first application.

Here, all of the goods in the SC Word Mark registration are goods commonly sold by universities as souvenirs and memorabilia so that alumnae and fans can express their support, as are the goods in the SC Interlock registration. They are all substantially similar in this key regard. Carolina's own prior registrations for other marks demonstrate that these are all within the same general class of University affiliated goods. *See generally* Carolina's registrations for its UNIVERSITY OF CAROLINA mark:¹²

Reg. No.	Reg. Date	Mark	Goods and Services
1645978	May 28, 1991	UNIVERSITY OF SOUTH CAROLINA	IC 016 paper goods and printed matter, namely, notebooks, memo pads, legal pad holders, and stationery. IC 018 leather goods, namely, luggage, leather briefcase-type portfolios, and key chain fobs. IC 025 clothing, namely, hats, sweatshirts and tee-shirts. IC 028. toys and sporting goods, namely footballs and stuffed animals.

¹¹ *Id.*

¹² The table summarizing certain of South Carolina's registrations is supported by the Notice of Reliance in Support of Motion to Dismiss filed herewith.

Reg. No.	Reg. Date	Mark	Goods and Services
1897799	June 6, 1995	UNIVERSITY OF SOUTH CAROLINA	IC 041 educational services, namely providing courses of instruction at the college level.
2685940	February 11, 2003	UNIVERSITY OF SOUTH CAROLINA	<p>IC 006 metal key chains and license plates.</p> <p>IC 014 Jewelry; namely, charms, necklaces and pendants, clocks, watches, and buckles of precious metal for clothing.</p> <p>IC 016 Paper goods and printed matter; namely, stickers, bumper stickers, decals, desk calendars, memo pads, stationery, notebooks, spiral notebooks, loose leaf binders; pens and pencils.</p> <p>IC 021. Sport bottles sold empty, coasters, insulating sleeve holders for beverage cans, glass drinking containers, beer mugs, shot glasses, earthenware mugs, and wastepaper baskets.</p> <p>IC 025 Clothing; namely, t-shirts, shorts, sweaters, rain coats, sweatshirts, sweatpants, golf shirts, jackets, baseball hats, visors, socks, shoes, and university athletic team jerseys.</p> <p>IC 028 Toys and sporting goods; namely, footballs, basketballs, soccer balls, baseballs, decorative wind socks, board games, flying discs, and stuffed toy animals.</p>

Carolina cannot now complain about California's registration of the SC Interlock for goods and services typically sold by universities, when it had notice that California registered a *broader* mark--the SC word mark--over ten years ago, and the SC word mark registration is now incontestable.

IV. Conclusion

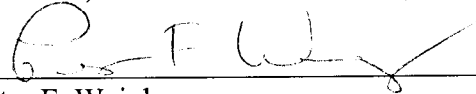
The *Morehouse* doctrine prevents a would-be canceller from harassing a registrant, and applying it in this proceeding will further that goal. Carolina must live with the SC Word Mark registration one way or the other—it lost its right to try to cancel that registration years ago. The

SC Interlock registration does not harm Carolina in any new way; it simply allows California to ensure that the records of the Patent and Trademark Office accurately reflect marks used in commerce. California requests that the Board dismiss the counterclaim in its entirety.

Dated: January 20, 2005.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP

A handwritten signature in dark ink, appearing to read 'P. F. Weinberg', is written over a horizontal line.

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Telephone: (303) 298-5901

Attorneys for Opposer
University of Southern California

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**Notice of Reliance Under 37 U.S.C. § 2.122(e)
In Support of Motion to Dismiss**

Under 37 C.F.R. 2.122(e), the University of Southern California ("California") submits the following Notice of Reliance on the following materials in support of California's concurrently filed motion to dismiss the counterclaim filed by the University of South Carolina ("Carolina") seeking to cancel California's Registration No. 2683137.

Carolina Marks Registered by the United States Patent and Trademark Office

In accordance with 37 C.F.R. § 2.122(e) and TBMP § 704.03(b), a party to an inter partes proceeding before the Board may introduce official records of the United States Patent and Trademark Office as part of its evidence in the case.

California respectfully requests that the Board take official notice pursuant to Federal Rule of Evidence 201 of the following registrations owned by Carolina and on file with this Office. Attached as Exhibits A through C, respectively, are true and correct copies of printouts from the U.S. Patent and Trademark Office Trademark Electronic Search System ("TESS") for the following registrations:

Exhibit	Reg. No.	Mark	Goods and Services
A	1645978	UNIVERSITY OF SOUTH CAROLINA	IC 016 paper goods and printed matter, namely, notebooks, memo pads, legal pad holders, and stationery. IC 018 leather goods, namely, luggage, leather briefcase-type portfolios, and key chain fobs. IC 025 clothing, namely, hats, sweatshirts and tee-shirts. IC 028. toys and sporting goods, namely footballs and stuffed animals.
B	1897799	UNIVERSITY OF SOUTH CAROLINA	IC 041 educational services, namely providing courses of instruction at the college level.
C	2685940	UNIVERSITY OF SOUTH CAROLINA	IC 006 metal key chains and license plates. IC 014 Jewelry; namely, charms, necklaces and pendants, clocks, watches, and buckles of precious metal for clothing. IC 016 Paper goods and printed matter; namely, stickers, bumper stickers, decals, desk calendars, memo pads, stationery, notebooks, spiral notebooks, loose leaf binders; pens and pencils. IC 021. Sport bottles sold empty, coasters, insulating sleeve holders for beverage cans, glass drinking containers, beer mugs, shot glasses, earthenware mugs, and wastepaper baskets. IC 025 Clothing; namely, t-shirts, shorts, sweaters, rain coats, sweatshirts, sweatpants, golf shirts, jackets, baseball hats, visors, socks, shoes, and university athletic team jerseys. IC 028 Toys and sporting goods; namely, footballs, basketballs, soccer balls, baseballs, decorative wind socks, board games, flying discs, and stuffed toy animals.

The foregoing registrations are not being attached for purposes of verifying ownership. Rather, they are being made part of the record in order to demonstrate the types of goods that Carolina has typically registered in the past. Carolina's registrations attached hereto as Exhibits A-C are for goods that are within the same general class of university affiliated goods

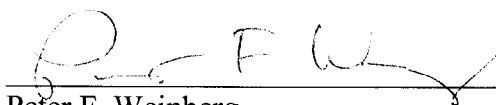
that are commonly sold by universities as souvenirs and memorabilia so that alumnae and fans can express their support. Consequently, the registrations demonstrate that the goods offered by Carolina and the goods offered by California in connection with both its SC Interlock and SC Word Mark registrations are all substantially similar in this key regard.

The above Exhibits are printouts from the electronic records of the Patent and Trademark Office's trademark automated search system. As their contents are not reasonably subject to dispute and are capable of immediate and accurate determination, the Board should take official notice of their contents. By attaching copies of the documents about which official notice is being sought, California has provided the Board with sufficient information to take official notice of the matters therein. Accordingly, the requirements of Federal Rule of Evidence 201 and 37 C.F.R. § 2.122(e) are satisfied.

Dated: January 20, 2005

Respectfully submitted,

GIBSON, DUNN & CRUTCHER, LLP

A handwritten signature in black ink, appearing to read "Peter F. Weinberg", is written over a horizontal line.

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Telephone: (303) 298-5901

Attorneys for Opposer
University of Southern California

EXHIBIT A



UNITED STATES PATENT AND TRADEMARK OFFICE

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UNIVERSITY OF SOUTH CAROLINA

Goods and Services

IC 016. US 037. G & S: paper goods and printed matter, namely, notebooks, memo pads, legal pad holders, and stationery. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 018. US 003. G & S: leather goods, namely, luggage, leather briefcase-type portfolios, and key chain fobs. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 025. US 039. G & S: clothing, namely, hats, sweatshirts and tee-shirts. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 028. US 022. G & S: toys and sporting goods, namely footballs and stuffed animals. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

Mark Drawing Code

(1) TYPED DRAWING

Serial Number

74046935

Filing Date

April 9, 1990

Current Filing Basis

1A

Original Filing Basis

1A

Published for Opposition

March 5, 1991

Registration

Number 1645978
Registration Date May 28, 1991
Owner (REGISTRANT) University of South Carolina CORPORATION SOUTH CAROLINA P.O. Box 14 Columbia SOUTH CAROLINA 29225
Attorney of Record Doreen L. Costa
Type of Mark TRADEMARK
Register PRINCIPAL-2(F)
Affidavit Text SECT 15. SECT 8 (6-YR).
Live/Dead Indicator LIVE

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EXHIBIT B



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Word Mark	UNIVERSITY OF SOUTH CAROLINA
Goods and Services	IC 041. US 107. G & S: educational services, namely providing courses of instruction at the college level. FIRST USE: 19050000. FIRST USE IN COMMERCE: 19050000
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	74493666
Filing Date	February 23, 1994
Current Filing Basis	1A
Original Filing Basis	1A
Published for Opposition	March 14, 1995
Registration Number	1897799
Registration Date	June 6, 1995
Owner	(REGISTRANT) University of South Carolina STATE AGENCY SOUTH CAROLINA 109 OSBORNE ADMINISTRATION BLDG. Columbia SOUTH CAROLINA 29208
Attorney of Record	JOHN C. MCELWAINE
Prior Registrations	1645978;1677542;1797399

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "UNIVERSITY"
APART FROM THE MARK AS SHOWN

Type of Mark SERVICE MARK

Register PRINCIPAL-2(F)

Affidavit Text SECT 15. SECT 8 (6-YR).

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Typed Drawing

Word Mark UNIVERSITY OF SOUTH CAROLINA

Goods and Services IC 006. US 002 012 013 014 023 025 050. G & S: metal key chains and license plates. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 014. US 002 027 028 050. G & S: Jewelry; namely, charms, necklaces and pendants, clocks, watches, and buckles of precious metal for clothing. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 016. US 002 005 022 023 029 037 038 050. G & S: Paper goods and printed matter; namely, stickers, bumper stickers, decals, desk calendars, memo pads, stationery, notebooks, spiral notebooks, loose leaf binders; pens and pencils. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 021. US 002 013 023 029 030 033 040 050. G & S: Sport bottles sold empty, coasters, insulating sleeve holders for beverage cans, glass drinking containers, beer mugs, shot glasses, earthenware mugs, and wastepaper baskets. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 025. US 022 039. G & S: Clothing; namely, t-shirts, shorts, sweaters, rain coats, sweatshirts, sweatpants, golf shirts, jackets, baseball hats, visors, socks, shoes, and university athletic team jerseys. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

IC 028. US 022 023 038 050. G & S: Toys and sporting goods; namely, footballs, basketballs, soccer balls, baseballs, decorative wind socks, board games, flying discs, and stuffed toy animals. FIRST USE: 19580000. FIRST USE IN COMMERCE: 19580000

Mark Drawing (1) TYPED DRAWING

Code**Serial Number** 76361611**Filing Date** January 22, 2002**Current Filing Basis** 1A**Original Filing Basis** 1A**Published for Opposition** November 19, 2002**Registration Number** 2685940**Registration Date** February 11, 2003**Owner** (REGISTRANT) University of South Carolina STATE AGENCY SOUTH CAROLINA 109 Osborne Administration Building Columbia SOUTH CAROLINA 29208**Attorney of Record** John C. McElwaine**Type of Mark** TRADEMARK**Register** PRINCIPAL**Live/Dead Indicator** LIVE[PTO HOME](#)[TRADEMARK](#)[TESS HOME](#)[NEW USER](#)[STRUCTURED](#)[FREE FORM](#)[BROWSE DICT](#)[TOP](#)[HELP](#)

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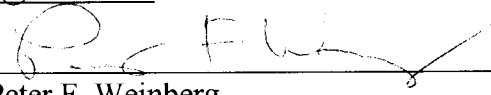
Certificate Of Service

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss and the Notice of Reliance Under 37 U.S.C. § 2.122(e) In Support of Motion to Dismiss are being placed in the United States mail, first class, postage pre-paid, on January 20, 2005, addressed to the following:

John C. McElwaine
Liberty Center, Suite 600
151 Meeting Street
Charleston, SC
29401-2239

Attorneys for Applicant University of South Carolina

A copy is being sent by e-mail to JCM@nmrs.com on the same date.



Peter F. Weinberg